

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 31 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GILBERTO A.,)	2 CA-JV 2012-0037
)	DEPARTMENT B
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY and RYAN R.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 19304000

Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

Frederick S. Klein

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Attorney for Appellant

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ESPINOSA, Judge.

¶1 Gilberto A. appeals from the juvenile court’s order terminating his parental rights to his son, Ryan R., born July 2008, on grounds of court-ordered time in care pursuant to A.R.S. § 8-533(B)(8)(c).¹ Gilberto argues insufficient evidence supports the court’s finding that he would be unable to discharge his parental responsibilities in the near future and that the Arizona Department of Economic Security (ADES) had made diligent efforts to provide sufficient reunification services. We affirm.

¶2 A juvenile court may terminate a parent’s rights if it finds clear and convincing evidence of one of the statutory grounds for severance and a preponderance of evidence that termination of the parent’s rights is in the child’s best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). “[W]e view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the [juvenile] court’s decision, and we will affirm a termination order that is supported by reasonable evidence.” *Jordan C. v. Ariz. Dep’t of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009) (citation omitted). That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof. *See Denise R. v. Ariz. Dep’t of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

¹The juvenile court also terminated the parental rights of Ryan’s mother, who is not a party to this appeal.

¶3 In 2009, when Ryan was approximately seventeen months old, police removed him from his mother's custody after she was arrested for possession of methamphetamine and drug paraphernalia, and felony child abuse. Ryan, who suffers from severe developmental delays and behavioral problems, was placed in foster care. At that time, Gilberto was participating voluntarily in a residential substance abuse treatment program. ADES filed a petition alleging Ryan was dependent as to his mother. After she identified Gilberto as Ryan's father, he admitted the allegations contained in an amended dependency petition and, in March 2010, the juvenile court adjudicated Ryan dependent as to him.

¶4 Gilberto participated in services including parent-child therapy, parenting skills training, and individual therapy. He also participated in substance abuse treatment to address his long-existing substance abuse problems. But Gilberto initially was unable to secure employment or independent housing despite his efforts to do so. In February 2011, he began using marijuana and alcohol. He did not inform ADES of his relapse and, due to problems with the testing facility's computer system, ADES did not become aware of it until the end of April.

¶5 During his relapse, Gilberto lost most of the gains in parenting skills he had made during his previous participation in parent-child therapy, and his therapist recommended suspending his unsupervised visits with Ryan in July 2011. Once ADES became aware of it, Gilberto's caseworker instructed him to address his relapse in therapy. As he did so, Gilberto also obtained an apartment and employment, and

remained sober through the time of the severance hearing. Following a status report in August 2011, the juvenile court nonetheless changed the case plan to severance and adoption and ADES moved to terminate Gilberto's parental rights based on chronic substance abuse pursuant to § 8-533(B)(3) and time-in-care grounds pursuant to § 8-533(B)(8)(c).

¶6 Ryan's caseworker testified that, despite Gilberto's successful participation in services, he would "not be able to care for Ryan, and maintain Ryan's special needs within the foreseeable future." She also expressed concerns about Gilberto's "emotional attunement" with Ryan due to his lack of progress in therapy, and Gilberto's ability to maintain sobriety long-term and protect Ryan from his mother.

¶7 Kristie McReynolds, a child and family therapist who had worked with Gilberto and Ryan since September 2010, opined that Ryan also had lost much of the progress he had made prior to Gilberto's relapse, and that an additional relapse would further diminish any gains Ryan had made. She opined that Gilberto currently could not parent Ryan effectively and he would not be able to do so for at least the next three to four months. She declined to say whether Gilberto could parent effectively if given six additional months of therapy, but noted she had "concerns that even in six month[s] [Gilberto] wouldn't be where [he] should be."

¶8 Psychologist Carlos Vega testified that any future drug or alcohol use would indicate "a serious problem in terms of [Gilberto's] progress" and that his recovery was "tenuous" in light of his previous failures to maintain sobriety. He further opined that

Gilberto's substance abuse and personality traits would prevent him from effectively parenting a child.

¶9 A clinical therapist who had worked with Gilberto for several months at the end of 2011 opined that he would be "capable" of providing effective parenting "within the near future." She also testified, however, that Gilberto's unemployment and lack of housing contributed to the stress that led to his relapse and opined that, if he were to become unemployed again, the resulting stress could increase the probability of another relapse.

¶10 The juvenile court concluded that ADES had not demonstrated, by clear and convincing evidence, that Gilberto's substance abuse would continue for a prolonged indeterminate period as required by § 8-533(B)(3). But it determined it had been proven, pursuant to § 8-533(B)(8)(c), that Gilberto had not remedied all the circumstances causing Ryan to be in out-of-home placement and that there was a substantial likelihood Gilberto would not be capable of providing effective parenting in the near future. The court summarized McReynolds's testimony detailing Gilberto's continuing difficulties in developing appropriate parenting skills.² The court further noted that, although Gilberto

²The juvenile court's ruling describes McReynolds's testimony as opining there was a "substantial likelihood" Gilberto could effectively parent if given "an additional six months of therapy." This description is not consistent with McReynolds's testimony. She was asked whether, considering a "six-month time period," she "couldn't say with assurance that there would be a substantial likelihood that [Gilberto] would not be capable of [effective parenting]." McReynolds responded that she did not know, but had "concerns that even in six month[s] we wouldn't be where we should be." Thus, to the extent the court's ruling reasonably can be read as adopting an estimate by McReynolds that Gilberto would be able to parent effectively if given six additional months of therapy,

was “on the road to long term sobriety,” his relapse had been harmful both to his progress and Ryan’s and had significantly delayed the reunification case plan. And the court expressed concerns that Gilberto would “reinstitute contact” between Ryan and his mother, which would place Ryan at risk. Upon finding that terminating Gilberto’s parental rights was in Ryan’s best interest, the court granted ADES’s motion to terminate Gilberto’s rights to Ryan.

¶11 Termination of parental rights is proper under § 8-533(B)(8)(c) if the child has been in court-ordered out-of-home placement for fifteen months or longer, the parent “has been unable to remedy the circumstances that cause the child” to be out of the home, “and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.” Gilberto argues on appeal that, because McReynolds could not say with certainty that he would not be able to effectively parent Ryan following six additional months of therapy, ADES failed to prove he would be unable to effectively parent “in the near future.” He first contends that, “[i]n the context of juvenile dependency proceedings, six months would be” in the near future, based on various dictionary definitions.

¶12 We disagree; if the legislature had intended the phrase “in the near future” to represent a specific or presumptive timeframe, it would have said so. *See Bobby G. v.*

it is not supported by the record. Even assuming, however, that Gilberto would have required six months of therapy to become an effective parent, the juvenile court did not err in concluding six months was not the “near future” pursuant to § 8-533(B)(8)(c) under the facts and circumstances of this case.

Ariz. Dep't of Econ. Sec., 219 Ariz. 506, ¶ 9, 200 P.3d 1003, 1006 (App. 2008) (plain language of statute best evidence of legislative intent). Instead, the legislature chose to use an elastic term. Thus, what qualifies as “in the near future” necessarily depends on the juvenile court’s assessment of the circumstances before it and will vary from case to case. *Cf. In re Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990) (“imprecise and elastic” term in statute creates “question[] of fact for resolution by the trial court”). We therefore reject Gilberto’s suggestion that six months is presumptively “in the near future” as contemplated by § 8-533(B)(8)(c).³

¶13 Gilberto also notes that, when considering termination of parental rights on time-in-care grounds, juvenile courts evaluate the circumstances existing at the time of the severance hearing, rather than the time of the dependency petition. *See Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, ¶ 22, 152 P.3d 1209, 1213 (App. 2007). He further reasons that “in the near future” also must be measured from the time of severance. He contends, therefore, that because the juvenile court relied in part on the fact that Ryan already had been in court-ordered care for twenty-seven months at the time of the severance hearings, the court improperly permitted termination of his parental rights “solely on the basis of what it deemed [Ryan’s] best interest.”

¶14 Gilberto’s argument misapprehends the law and the juvenile court’s ruling. We agree that what timeframe constitutes “the near future” as contemplated by § 8-

³Even if we agreed with Gilberto that there was some timeframe that presumptively would qualify as “in the near future,” we have no basis to conclude that timeframe would be six months.

533(B)(8)(c) is most reasonably considered from the time of the severance hearing—not dependency. *Cf. Marina P.*, 214 Ariz. 326, ¶ 22, 152 P.3d at 1213. But, as noted above, because the legislature declined to define a precise timeframe, the parameters of that timeframe rest on the facts and circumstances of each case. Such circumstances might include the parent’s current ability to parent effectively and the amount of time a child has been in out-of-home care because those factors inform the court whether it is likely the parent will make sufficient progress in the near future to become an effective and safe parent for the child. Accordingly, we reject Gilberto’s argument that the court erred in considering the time Ryan had been in court-ordered care as a factor in determining whether Gilberto could provide effective parenting in the near future.

¶15 Moreover, contrary to Gilberto’s argument, the juvenile court’s ruling was not based “solely” on a determination that another six months would have meant Ryan had been out of his father’s care for a total of thirty-three months. The court also noted the lack of progress Gilberto had made in his parenting training, the risk that he would relapse and resume his substance abuse as well as the accompanying risks a relapse would create for Ryan, and the risk he would permit Ryan’s mother to have contact with him. Gilberto does not suggest these findings are unsupported by the evidence or do not support the court’s conclusion that Gilberto would be unable to adequately parent Ryan in the near future.

¶16 Gilberto next argues insufficient evidence supported the juvenile court’s conclusion that ADES’s reunification efforts were sufficient. Section 8-533(B)(8)

requires that ADES make “a diligent effort to provide appropriate reunification services” before termination may be ordered. Gilberto argues that ADES’s efforts were not diligent because ADES—due to the testing company’s computer system problems—did not effectively monitor his drug test results and therefore did not become aware of his relapse until months after it had begun. The juvenile court found the computer system problems did not justify ADES’s failure to properly review Gilberto’s test results and surmised that Gilberto would have “re-engaged himself in . . . relapse prevention” had ADES become aware of his positive tests sooner and confronted him about them.

¶17 We reject, however, Gilberto’s conclusory argument that the juvenile court’s finding is “inconsistent” with a finding that ADES had provided sufficient reunification services. To show “a diligent effort to provide appropriate reunification services,” § 8-533(B)(8), ADES must have provided Gilberto “with the time and opportunity to participate in programs designed to improve [his] ability to care for the child”; however, it “need not [have] provide[d] ‘every conceivable service.’” *Mary Ellen C. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 185, ¶ 37, 971 P.2d 1046, 1053 (App. 1999), quoting *In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). The juvenile court found that ADES had provided a wide range of reunification services, including substance abuse counseling. And, in the months before his relapse, Gilberto had made significant progress in his services and had been honest about his previous drug abuse—further reducing the urgency ADES felt to fully examine his compliance. The fact Gilberto might have benefitted from more stringent monitoring

of his drug tests does not render otherwise sufficient reunification services insufficient as a matter of law. And, as Gilberto acknowledged, had he promptly disclosed his relapse, he might have been able to address it more quickly and effectively. ADES's duty to provide reunification services does not absolve a parent of his or her duty to comply with the case plan. Accordingly, we find no error in the juvenile court's conclusion that ADES made a diligent effort to provide appropriate reunification services as required by § 8-533(B)(8).

¶18 For the reasons stated, the juvenile court's order terminating Gilberto's parental rights to Ryan is affirmed.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge